

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN CIVIL LIBERTIES UNION, CENTER FOR
CONSTITUTIONAL RIGHTS, INC., PHYSICIANS FOR
HUMAN RIGHTS, VETERANS FOR COMMON SENSE,
VETERANS FOR PEACE,

Plaintiffs-Appellees,

v.

Dkt. No. 15-1606

UNITED STATES DEPARTMENT OF DEFENSE, and its
components Department of Army, Department of Navy,
Department of Air Force, Defense Intelligence Agency,
UNITED STATES DEPARTMENT OF THE ARMY,

Defendants-Appellants.

**DEFENDANTS-APPELLANTS' MOTION TO REMAND
FOR CONSIDERATION OF CHANGED CIRCUMSTANCES**

Defendants-appellants the United States Department of Defense (“DoD”), and its components Department of Army, Department of Navy, Department of Air Force, Defense Intelligence Agency, and the United States Department of the Army (collectively, the “government”), pursuant to Federal Rule of Appellate Procedure 27, move for an order remanding this matter to the district court for consideration of new and material events that have transpired since the time of the government’s appeal. This appeal has been fully briefed, and oral argument has been set for January 15, 2016.

Specifically, the certification issued by Secretary of Defense Leon Panetta on November 9, 2012 (the “Panetta Certification”), in accordance with the Protected National Security Documents Act of 2009 (“PNSDA”), has expired, and Secretary of Defense Ashton Carter issued a new certification pursuant to the same statute on November 7, 2015 (the “Carter Certification”).

As described below, the propriety of the Panetta Certification and the record supporting its issuance are among the key issues presented by the government's appeal, which seeks reversal of the district court's order directing public disclosure of photographs covered by that certification. However, the Panetta Certification is no longer operative, and the record supporting the Carter Certification is significantly different. Indeed, the Carter Certification does not apply to all of the photographs certified under the Panetta Certification. Accordingly, the district court's judgment addressed facts that no longer control the determination of this case. That judgment should accordingly be vacated, and the matter remanded for the district court to consider, in the first instance, the effect of the Carter Certification on plaintiffs-appellees' (the "ACLU") claim that the remaining photographs at issue must be disclosed.

Procedural History

This appeal arises out of a Freedom of Information Act ("FOIA") suit brought by the ACLU against multiple government agencies, seeking the release of records relating to the treatment of detainees held by the United States abroad. The Department of Defense and the Department of the Army are the only remaining defendants, and the only remaining records at issue are certain government photographs responsive to ACLU's FOIA request.

The responsive photographs at issue have been the subject of several certifications issued under the PNSDA, a statute intended to "[c]odif[y] the President's decision to allow the Secretary of Defense to bar the release of detainee photos." (JA 201 (Conference Summary by the United States Senate and the U.S. House of Representatives Committees on Appropriations on the Department of Homeland Security Appropriations Act, FY2010, dated October 7, 2009)).

Following enactment of the statute on October 28, 2009, and while this litigation was

pending, the photographs were first certified by then-Secretary Robert Gates in November 2009. The ACLU challenged that certification, but in an oral ruling in July 2011, the district court granted summary judgment for the government, concluding that the certification by Secretary Gates was valid and exempted the photographs from FOIA's disclosure requirements. (JA 202).

Shortly before Secretary Gates's initial certification expired, Secretary Panetta issued another PNSDA certification in November 2012 (as authorized by the statute), supporting the continued withholding of the photographs. (JA 246). This certification is at the heart of the government's appeal. The district court, while recognizing that the new certification was "virtually identical" to the original certification, nevertheless concluded that the Panetta Certification was insufficient under the PNSDA. Among other things, the district court determined that the record did not include adequate information to support Secretary Panetta's determination that release of the photographs would endanger U.S. citizens, military personnel, or employees abroad. (JA 256). The district court also determined that the PNSDA requires the Secretary to consider each photograph individually, rather than collectively. (JA 258-59). The court provided the government with an opportunity to submit additional evidence to demonstrate that the Department of Defense's actions comported with the district court's view of the statute's requirements. (JA 260).

The government then submitted a declaration explaining the process behind the Panetta Certification. (JA 280 (Declaration of Megan M. Weis dated December 19, 2014 ("Weis Declaration")), attached without exhibits as Ex. A to the Declaration of Liam Apostol dated December 22, 2015 ("Apostol Declaration")). As Weis explained, she was designated by DoD's General Counsel to review each of the photographs on the Secretary's behalf. (Weis Decl. ¶ 8). She placed the photographs into three categories based on their content, and selected five to ten photographs in each category to create a representative sample. (*Id.*). She then provided the

representative sample to counsel for each of the Chairman of the Joint Chiefs of Staff, the Commander of U.S. Central Command, and the Commander, International Security Assistance Force/United States Forces—Afghanistan, for purposes of obtaining their recommendations as to whether some, all, or none of the photographs should be certified. (*Id.* ¶ 9). After receiving recommendations from each of the commanders (*id.* ¶¶ 9-11), Weis met with DoD’s General Counsel to discuss the recommendations and review the representative sample (*id.* ¶ 13). She also provided him with a disk containing all of the photographs, and a draft certification. (*Id.*) Following a meeting between DoD General Counsel and Secretary Panetta, Secretary Panetta issued a certification as to all of the photographs. (*Id.*)

The government argued that the Weis Declaration demonstrated that, while not required to do so under the PNSDA, it had conducted an individualized review of each of the photographs and that the three recommendations relied upon by Secretary Panetta in making his recertification provided an ample basis for his conclusion that public disclosure of the photographs would endanger U.S. citizens, servicemembers, or employees abroad.

In February 2015, the district court ruled that the additional materials submitted by the government were insufficient to satisfy the PNSDA. (JA 327). The district court entered an order stating that the “Secretary must demonstrate knowledge of the contents of the individual photographs rather than mere knowledge of his commanders’ conclusions,” in order to certify such photographs. (JA 328). “He may obtain such knowledge either by reviewing the photographs personally or having others describe their contents to him,” the district court continued, “but he may not rely on general descriptions of the ‘set’ of ‘representative samples,’ as such aggregation is antithetical to individualized review without precise criteria for sampling.” (JA 328-29). The court also stated that the certification must make clear “the Secretary’s factual basis for concluding that

disclosure would endanger U.S. citizens, Armed Forces, or government employees.” (JA 329).

“At minimum, the submission must describe the categories of objectionable content contained in the photographs, identify how many photographs fit into each category, and specify the type of harm that would result from disclosing such content.” (JA 329).

By letter dated March 17, 2015, the government informed the district court that it elected not to make any further submission with respect to the Panetta Certification. (Dist. Ct. ECF No. 547). However, the government reiterated to the court that the Panetta Certification would expire on November 9, 2015, and that the government had commenced the process of evaluating the possible recertification of some or all of the photographs. (*Id.*). The government informed the district court that it was taking into consideration the court’s views as it was fashioning the process for possible recertification (although the government explicitly refrained from committing that the process would necessarily satisfy all aspects of the court’s orders), and suggested that for purposes of judicial economy and efficiency, the Court consider staying judicial proceedings until the recertification process had concluded. (*Id.*). The government noted the likelihood that an appeal would not be decided prior to the expiration of the Panetta Certification, and the possibility that the appeal might be mooted if, as a result of the recertification process, some or all of the photographs were recertified. (*Id.*).

The district court rejected the government’s suggestion that its disclosure order be stayed pending recertification. (Dist. Ct. ECF No. 549). Final judgment was entered on April 1, 2015 (JA 333), and this appeal followed (JA 335). On June 2, 2015, this Court granted the government’s motion for a stay of the district court’s disclosure order pending appeal. (ECF No. 47).

Events Occurring Since the Government's Appeal

As noted above, pursuant to the PNSDA, the Panetta Certification expired on November 9, 2015. Approximately six months before its expiration, DoD implemented a multi-phase process to determine whether the photographs certified by Secretary Panetta should be recertified or released. (Apostol Decl. ¶ 3). The government designed this multi-layered process with the views of the district court in mind. (*Id.*). As described below, the process leading to the Carter Certification differed in material ways from the process leading to the Panetta Certification.¹

In the first phase of the process, an attorney from DoD's Office of General Counsel reviewed each photograph individually based on how likely it was that the public release would result in the harm the PNSDA was designed to prevent, namely the endangerment of citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States. (*Id.* ¶ 5).

Second, the photographs were then provided to commissioned officers assigned to the office of the Joint Staff, Deputy Director for Special Operations, Counterterrorism and Detainee Operations ("Joint Staff J37"). (*Id.* ¶¶ 4, 6). Relying on their years of professional military training and military experience, these officers conducted an independent, individualized review of each photograph to assess the likelihood that disclosure would result in the harm that the PNSDA was designed to prevent. (*Id.* ¶ 6).

The third phase of the certification process involved a review of the combined work product of the DoD attorney and the Joint Staff J37 officers. (*Id.* ¶ 7). In this third phase, three different attorneys from DoD's Office of General Counsel and one uniformed attorney from the

¹ The Apostol Declaration does not provide all details of the process leading to the Carter Certification. Rather, it highlights certain differences between that process and the one underlying the Panetta Certification. (*Id.* ¶ 2).

Department of the Army also examined each photograph for the purpose of assessing whether disclosure would reasonably be likely to result in the harm the PNSDA was designed to prevent. (*Id.*). Upon completing their review, this group met with the officers of Joint Staff J37 and uniformed attorneys from the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff to reach a final consensus. (*Id.*).

Next, DoD's Office of General Counsel developed a representative sample of the photographs for the Secretary's review. (*Id.* ¶ 8). The representative sample was intended to provide the Secretary with a full appreciation of the nature of all of the photographs and the full range of the gravity of content contained herein. (*Id.*).

Finally, the representative sample of photographs was provided to Defense Secretary Carter for his consideration. (*Id.* ¶ 10). In addition, Secretary Carter solicited and received recommendations from the Chairman of the Joint Chiefs of Staff, the Commander of United States Central Command, the Commander of United States Africa Command, and the Commander of U.S. Forces—Afghanistan. (*Id.* ¶ 9).

On November 7, 2015, Secretary Carter issued a PNSDA certification to cover all but approximately 198 photographs previously certified by Secretary Panetta. (*Id.* ¶ 10 & Ex. B).

On November 17, 2015, counsel for the government in this litigation informed counsel for the ACLU about the expiration of the Panetta Certification and issuance of the Carter Certification, and asked whether the ACLU would consent to a remand of this matter in light of these events. On November 23, the ACLU advised that they could not agree to a remand unless they knew more about the process underlying Secretary Carter's certification (among other things). Counsel conferred by telephone the next day to discuss the certification process, but on December 3, the ACLU indicated that they could not formulate a position on the government's request for a remand

without first examining the government's supporting papers.

In Light of Changed Circumstances, Remand Is Appropriate

In this Circuit, ““where circumstances have changed between the ruling below and the decision on appeal, the preferred procedure is to remand to give the district court an opportunity to pass on the changed circumstances.”” *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 196 (2d Cir. 2010) (quoting *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1976)); accord *New England Merchants Nat’l Bank v. Iran Power Generation and Transmission Co.*, 646 F.2d 779, 783-84 (2d Cir. 1981). In such a situation, where the district court’s judgment is based on facts that no longer control, that judgment should be vacated. See *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 98 (1993) (“If, before the court had decided the case, either party had advised it of a material change in circumstances that entirely terminated the party’s controversy, it would have been proper either to dismiss the appeal or to vacate the entire judgment of the District Court.”).

The Court should vacate the judgment and remand this matter because of the change in circumstances here. The certification that is at the center of the parties’ current dispute, and which forms the basis of the current appellate record—the Panetta Certification—is no longer operative. Indeed, a ruling by this Court on the record and briefs before it that determined whether the Panetta Certification and the process leading to it are valid under the PNSDA would have no effect, as it would leave open the question that now determines if the photographs must be released: whether the currently operative PNSDA certification is sufficient to permit withholding of the photographs.

And as described above, the process culminating in the current certification by Defense Secretary Carter is substantially different from that underlying the Panetta Certification. Unlike the former process, the process underlying the Carter Certification involved multiple layers of

individual review by both DoD attorneys and uniformed officers with professional experience in making national security judgments. And Secretary Carter's certification determination is based, in part, on new recommendations from his top commanders evaluating the likely harms from disclosure in light of the current threat environment. As a result of this process and the commanders' recommendations, approximately 198 photographs have been decertified and are currently being processed for release. (Apostol Decl. ¶ 10).

As noted above, the government devised the process behind the Carter Certification with the district court's views in mind. The district court should be given the first opportunity to examine the Carter Certification, decide whether it affects the court's view of the merits of the ACLU's claim that the remaining photographs should be disclosed, and if so, how. Accordingly, the government respectfully requests that the Court enter an order remanding this matter to the district court for further proceedings.

Conclusion

The district court's judgment should be vacated and remanded for further consideration, to provide the district court with the opportunity to address in the first instance the changed circumstances described in this motion.

Dated: New York, New York
December 22, 2015

Respectfully Submitted,

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